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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 1003

RICHARD E. LOCKE,
Petitioner,

vs.

RIVER LINES INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the case	3
A. The case below	3
B. The facts	3
Reasons for granting the writ	6
A. Importance of the question	6
B. Conflict with prior decisions	6
Summary	7
Conclusion	8

Table of Authorities Cited

Cases

	Page
Beard v. Ellerman Lines, Ltd., 289 Fed. 2d 201	7
Guiterrez v. Waterman Steamship Corp., 373 U.S. 206	7
Matson Navigation Co. v. Huff, 388 Fed. 2d 205	6
Olsen Towboat Co. v. Dutra, 300 Fed. 2d 883	7
Rich v. Ellerman & Bucknall Steamship Co., 278 Fed. 2d 704	6
Thompson v. Calmar Steamship Corp., 331 Fed. 2d 657	7

Statutes

28 U.S.C., Section 1254(1)	2
Merchant Seaman's Act of June 5, 1920, Section 33	3
Merchant Seaman's Act of June 5, 1928, Section 33	3

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner Richard E. Locke prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on November 10, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 352 Fed. 2d No. 2, page 307, and is reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeal was entered November 10, 1965. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether respondent as owner and operator of a tug with a barge in tow, in mooring said barge to a river bank cluster of trees, is liable under the doctrine of negligence or unseaworthiness, when the contact of the barge with a river bank caused a rotten or defective tree trunk in said cluster of trees, to break and fall upon a seaman on said barge while preparing to secure a mooring line to a tree in said cluster.

2. Whether the use of a rotten or defective (unseaworthy) tree by a vessel as a mooring device constitutes an unseaworthy appurtenance of the vessel and makes said vessel unseaworthy and liable for injuries suffered by a seaman aboard said vessel when said tree trunk breaks and falls upon said seaman.

3. Whether respondent is negligent when the Captain of its tug orders a seaman to place himself in an unsafe place to work (on the deck of the barge under a mooring tree) having knowledge that a tree or its branches or trunk might break and fall upon said seaman.

STATUTES INVOLVED

This action was brought under Section 33 of the Merchant Seaman's Act of June 5, 1928, and all amendments thereto and under the general maritime law.

STATEMENT OF THE CASE

A. The Case Below.

The jurisdiction of the District Court was invoked by reason of Section 33 of the Merchant Seaman's Act of June 5, 1920 and all amendments thereto and all other applicable and maritime tort law in the premises.

The District Court found that libelant was not guilty of contributory negligence but placed its decision in favor of respondent upon the ground that libelant's injury was solely, although unfortunately, caused by an accident to which no negligence of the shipowner nor any unseaworthiness of the ship contributed.

The Ninth Circuit affirmed the judgment below on the basis that no issues were raised on appeal other than those presented to the District Court, save the contention that in certain of its findings the District Cour was clearly erroneous.

B. The Facts.

The facts in this case may be summarized as follows: On June 22, 1961, petitioner was employed as a deckhand aboard the tug YUBA owned by respondent

and said tug had in tow an empty rock barge and said vessels were proceeding down the Sacramento River with their destination being River Lines dock, Sacramento, California. About 20 miles up river from Sacramento, the river widens out at the point where Sacramento Slough joins the Sacramento River. At this point the Captain decided to moor the rock barge to a cluster of trees on the river bank. (R. 55.)

The crew of said tug and barge consisted of the Captain, a second operator and petitioner as deckhand. (R. 45.)

The tug had the barge in tow by means of a seventy foot manila line at the end of which a wire bridle proceeded in a "V" to the starboard and port bow of the barge for a total of almost one hundred feet of line between the stern of the tug and the bow of the barge. (R. 142.)

Petitioner upon receiving the order from the Captain that they were going to tie the barge up to the river bank tree in a jacknife maneuver, proceeded to the tow bit of the tug, stood by the tow line, slacked it off a little bit so as to make enough room for the jacknife operation, took up the slack, secured same and upon the tug making its one hundred and eighty degree turn and placing its bow alongside the starboard bow of the barge, petitioner in accordance with his required duties, proceeded onto the barge and to the port stern where he started taking the line loose from the bit preparatory to using said line to secure the port stern of the barge to the river bank trees. Just as he got the line free, petitioner heard

the barge hit the bank and the tree, and upon hearing branches falling, tried to duck out of the way, at which time he was struck and knocked unconscious by a falling tree trunk. (R. 55 through 59.)

The trial judge in his memorandum of decision states: "It appears inferentially that the branch fell as the result of the movement of the barge against the bank—although there is no substantial evidence that the contact was unusual". (Memorandum of Decision, page 1, lines 22 to 25.) In addition, the trial judge stated "Well, I am assuming that, but the tree fell down and I think that it fell from some kind of activity of the barge on the shore. Otherwise the thing would have been too coincidental." (R.T. page 237, lines 6 through 9.)

It was also stated by counsel for respondent: "Yes, I would assume that the barge would come in contact with the trees, and those things are on spongy ground, and they wobble and it came down." (R.T. 237, lines 1 through 12.)

One of the findings of the trial court was "it is not uncommon that a limb may be jarred loose and fall from a tree in this process. (Tying barges up to trees along the banks of the river.) This is well known to the crews of tugs who work in the river." (Findings of Fact No. 9; R. 146.)

There was no dispute that the part of the tree that fell upon petitioner was decayed. (R. 146.)

REASONS FOR GRANTING THE WRIT

A. IMPORTANCE OF THE QUESTION.

Whether a shipowner is required to warrant the seaworthiness of a mooring place or structure which it has exclusively chosen is a question of major importance to a seaman under the laws and decisions relating to the Jones Act.

Whether the failure of the Captain of a vessel to provided a deckhand with a reasonably safe place in which to work, said Captain having before hand full knowledge that under the circumstances said place was unsafe, is negligence under the Jones Act, is of major importance to all seamen.

B. CONFLICT WITH PRIOR DECISIONS.

It is settled law that a shipowner is under an absolute and non-delegable duty to provide a seaman with a reasonably safe place in which to work and its failure to do so constitutes negligence. The shipowner is liable for an unseaworthy condition, gear or appurtenance, whether it be on the ship or on shore if said appurtenance is being used as ship's gear. In such event, the shipowner is liable regardless of notice and regardless of the fact that the dangerous condition was created by another.

Matson Navigation Co. v. Huff, 388 Fed. 2d 205;

Rich v. Ellerman & Bucknall Steamship Co., 278 Fed. 2d 704;

Beard v. Ellerman Lines, Ltd., 289 Fed. 2d 201;
Olsen Towboat Co. v. Dutra, 300 Fed. 2d 883;
Guiterrez v. Waterman Steamship Corp., 373 U. S. 206;
Thompson v. Calmar Steamship Corp., 331 Fed. 2d 657.

SUMMARY

It is respectfully submitted that the decision of the trial court and the Ninth Circuit in this case should be reversed. The warranty of seaworthiness should include a defective or rotten tree when the same is being used by the shipowner as a mooring device for his ship. It was the absolute and non-delegable duty of respondent shipowner to provide petitioner with a reasonably safe place in which to work. Respondent in this case had full knowledge that in this type of mooring operation trees were caused to break and fall. In a wanton and careless disregard of this knowledge, petitioner was directed by the shipowner to work in a place where such a falling trunk or limb could, and in fact did, fall upon him. The trial court found no contributory negligence on petitioner's part, found that a branch did fall upon plaintiff and found inferentially that the branch fell as the result of the movement of the barge against the bank, but held for respondent on the basis that the injury was solely, although unfortunately, caused by an accident to which no negligence of the shipowner nor any unseaworthiness of the ship contributed. The erroneous

basis of the court's decision for this finding was that the tree was not part of any gear or device being used by the tug barge unit in its operations. (Memorandum of Decision, page 3.) It is clear that such was not the case but in fact that said tree was being used as a mooring device or anchor equivalent. The conclusion of the trial court completely ignores the basic concept of maritime law which imposes a strict duty on the part of the shipowner to protect its crew members from injury.

CONCLUSION

For these reasons it is respectfully submitted that the petition for Writ of Certiorari should be granted.

January 31, 1966.

EDWARD R. KAY,
Attorney for Petitioner
Richard E. Locke.

FRANCIS J. SOLVIN,
Of Counsel.

(Appendix Follows)

Appendix

United States Court of Appeals
For the Ninth Circuit

Richard E. Locke, Appellant, vs. River Lines, Inc., Appellee.	No. 19,838

[November 10, 1965]

On Appeal from the United States District Court
for the Northern District of California,
Southern Division

Before: MERRILL, KOELSCH and BROWNING, Circuit Judges

Per Curiam:

No issues are raised on appeal other than those presented to the District Court save the contention that in certain of its findings the District Court was clearly erroneous.

In our judgment the findings in question were not clearly erroneous. Upon the remaining issues we agree with the District Court for the reasons set forth in its opinion.

Judgment affirmed.

United States Court of Appeals
For the Ninth Circuit

Richard E. Locke, Appellant, vs. River Lines, Inc., Appellee.	No. 19,838

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered November 10, 1965

Subject Index

	Page
Question presented	1
Statement	2
Argument	3
1. No important question of federal law is presented	3
2. No conflict with this court or another court of appeals is presented	4
Conclusion	8

Table of Authorities Cited

	Page
Alaska Steamship Co. v. Petterson, 347 U.S. 396, 1954 A.M.C. 860	5
Beard v. Ellerman Lines, Ltd., 289 F.2d 201, 1961 A.M.C. 1147 (3rd Cir.)	6
Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 1963 A.M.C. 1649	6
Huff v. Matson Navigation Co., 338 F.2d 205, 1964 A.M.C. 2219 (9th Cir.)	5
Luckenbach v. McCahan Sugar Refining Co., 248 U.S. 139 (1918)	3
Morales, et al. v. The City of Galveston, 370 U.S. 165, 1962 A.M.C. 1450	7
Olson Tow Boat Co. v. Dutra, 300 F.2d 883, 1962 A.M.C. 1286 (9th Cir.)	5
Pacific Tow Boat Co. v. States Marine Corp., 276 F.2d 745, 1960 A.M.C. 696 (9th Cir.)	3
Rich v. Ellerman & Bucknall Steamship Co., 278 F.2d 704, 1960 A.M.C. 1580 (2d Cir.)	6
Thompson v. Calmar Steamship Corp., 331 F.2d 657, 1964 A.M.C. 2249 (3rd Cir.)	6
United States v. Oregon State Medical Society, 343 U.S. 326 (1952)	1

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

The only question presented by this record is whether it was error in the Court of Appeals to have lacked a definite and firm conviction that the District Court was wrong in finding that negligence and unseaworthiness were not proved and to refuse, accordingly, to set aside the findings as clearly erroneous.[1]

[1]Findings are to be set aside as clearly erroneous only when the Court of Appeals has the "definite and firm conviction that a mistake has been committed." *United States v. Oregon State Medical Society*, 343 U.S. 326, 339 (1952).

STATEMENT

Under a contract of towage respondent's tug YUBA had towed a barge some distance down the Sacramento River and had occasion to leave the barge and return upstream to bring down another (Findings 5 and 6).[2] In the absence of artificial mooring places and in accordance with the custom of the river (Finding 9) the master maneuvered the barge alongside the bank to be tied to a certain cottonwood tree (Finding 5). Petitioner, a deckhand on the tug, boarded the barge and proceeded to the area on the barge from which he would pass a line about the cottonwood tree (Finding 7).

As the barge reached the bank, after a customary and uneventful maneuver and without unusual force (Findings 10 and 11), a branch or portion of trunk, unknown to anyone concerned to be dead, fell from the top of a willow tree near the cottonwood tree to which the barge was to be tied and struck and injured Petitioner's arm (Finding 7).

Certain misstatements of these underlying facts run through the Petition and call for correction: first, it is not true that the cottonwood tree to which the barge was to be tied broke, but it was instead a nearby willow tree (Finding 7); second, it was not true that the master had knowledge of any defect in the tree or any likelihood that it would break (see Finding 7) and there was no evidence whatever of such knowledge to contradict the finding of reasonable care (Finding 13).

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[2]The Transcript of Record consists of three volumes. Volume II, the Clerk's Transcript of Record from the District Court, was not paginated consecutively. It is impossible, therefore, to provide meaningful page references to Volume II and accordingly the references indicate the documents in Volume II by name only.

Petitioner sued the owner of the tug claiming negligence in the maneuever and unseaworthiness of both the tug and the barge. The matter was fully heard and, upon all the evidence, the District Court found that Respondent had not been negligent and that both the tug and the barge were reasonably fit for the service in which they were engaged and therefore seaworthy (Findings of Fact and Conclusions of Law).

Petitioner appealed to the Court of Appeals attacking the District Court's findings of reasonable care and reasonable fitness and the Court of Appeals in its opinion concluded that the findings in question were not shown to be clearly erroneous (Opinion, R. Vol. I, p. 4).

ARGUMENT

1. NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED

This case turns simply upon questions of fact peculiar to itself. The finding of seaworthiness is a finding of fact. *Luckenbach v. McCahan Sugar Refining Co.*, 248 U.S. 139, 145 (1918). So also is a finding of reasonable care or lack of negligence. *Pacific Tow Boat Co. v. States Marine Corp.*, 276 F.2d 745, 752, 1960 A.M.C. 696, 705 (9th Cir.). No novel or unfamiliar doctrine was announced or resorted to by either of the courts below in respectively making and affirming these findings.

In an effort to state the questions in such a way as to involve matters of law, Petitioner has employed facts contrary to the record, as we have already pointed out. The Court will readily recognize that when these facts

are correctly stated the apparent legal content of Petitioner's questions disappears.

While this case is of obvious importance to the individual parties involved, the particular facts upon which it turns are most unusual and so the ruling is of little importance to others than the parties here.[3] As the case involves neither a question of law nor an important question of general interest, it clearly does not involve an important question of Federal law which requires to be settled by this Court.

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2. NO CONFLICT WITH THIS COURT OR ANOTHER COURT OF APPEALS IS PRESENTED

Petitioner suggests the existence of a conflict with five other decisions of the Courts of Appeals and one decision of this Court but a review of the holdings in those cases discloses no conflict at any point.

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[3]We are not unmindful that Petitioner may be trying to present through this case a much broader question of the application of the warranty of seaworthiness, upon which this record is scarcely appropriate and as to which none of the parties having a substantial concern is represented here. To treat this case as a matter of law and hold the tug owner liable for unseaworthiness would require the disposition of three questions by this Court; first, whether the warranty should be extended to piers and other artificial moorings; second, whether it should then also be extended to natural features used in the absence of such artificial facilities; and, third, to what extent the warranty should extend outward into the environment of either artificial or natural moorings. This case surely does not present a record upon which the Court should undertake to determine whether the warranty of seaworthiness should be deemed extended by the owners of seagoing vessels to all the piers, quays, wharves, docks, jetties, floats and lighters alongside which their vessels may find themselves moored, not merely in the United States, but in Santo Domingo, Singapore or Saigon.

Huff v. Matson Navigation Co., 338 F.2d 205, 1964 A.M.C. 2219 (9th Cir.) is a case not from another Circuit but from the same Circuit as the present case. There the District Court held, as a matter of law, that, in determining the seaworthiness of the vessel as respects an injured longshoreman, it would not consider the condition of shore-based discharging equipment extending down into the hold of the vessel where the accident occurred and the Court of Appeals held simply that it was error to exclude from consideration the modern shore-based discharging equipment which had replaced more primitive shipboard methods but did not itself find the vessel unseaworthy and remanded the case to the District Court for that issue of fact to be determined, as usual, in the light of all the circumstances of the case.

Olson Tow Boat Co. v. Dutra, 300 F.2d 883, 1962 A.M.C. 1286 (9th Cir.) is again from the same Circuit as the present case. There, as here, the Court of Appeals affirmed the findings of the trier of fact. In that case unseaworthiness and negligence had been found, with regard to a metal barb on the wire mooring line by which the tug was tied to the pier, where there was no showing that the line belonged to the tug rather than to the pier. Not only was such a line obviously a part of the normal equipment of the vessel but it had clearly been incorporated into the vessel's appurtenances under the standard of *Alaska Steamship Co. v. Petterson*, 347 U.S. 396, 1954 A.M.C. 860. Nothing in that case appears to compel the District Court to find the vessels not reasonably fit for their service in the circumstances of the present case.

In *Beard v. Ellerman Lines, Ltd.*, 289 F.2d 201, 1961 A.M.C. 1147 (3rd Cir.), the Court of Appeals simply held that there was evidence sufficient to permit the jury to find negligence of the shipowner and did not reach the question of seaworthiness. Similarly, in *Thompson v. Calmar Steamship Corp.*, 331 F.2d 657, 1964 A.M.C. 2249 (3rd Cir.), the Court held that there was evidence of both negligence and unseaworthiness sufficient to permit the jury to bring in a verdict for the plaintiff, as it did.

In *Rich v. Ellerman & Bucknall Steamship Co.*, 278 F. 2d 704, 1960 A.M.C. 1580 (2d Cir.), the plaintiff's claim was that he had been injured as a result of unseaworthiness in respect of the condition of a working platform consisting of certain cargo stowed prior to his injury and the Court of Appeals held that it was wrong, in the face of such a claim, for the District Court to have instructed the jury that the vessel owner would not be liable for an injury resulting solely from the manner in which the stevedore did the work, since such an instruction would bar the plaintiff's recovery if the condition of unseaworthiness of which he complained happened to have been created by the stevedore.

Finally, in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 1963 A.M.C. 1649, in contradistinction to the present case, the trier of fact found negligence and unseaworthiness with respect to stowage and the Court of Appeals overturned the findings when, in the judgment of this Court, there was sufficient evidence to support them.

None of the cases discussed presents any analogy to the present case. The most analogous case to the present one

which appears to have been discovered by either party is *Morales, et al. v. The City of Galveston,* 370 U.S. 165, 1962 A.M.C. 1450. There the libelants had been injured when grain containing an excessive amount of insecticide gas was released by the elevator into the cargo hold where they were working, making the hold untenable because of the presence of noxious fumes. Despite the fact that the fumes made the hold dangerous, the District Court's finding that the vessel was reasonably fit and therefore seaworthy was affirmed, as here, by the Court of Appeals. This Court noted that the injuries were not caused by the ship, her appurtenances, or her crew but by the unexpected introduction of a "noxious agent from without" and, as the trier of fact had found the vessel reasonably fit, under proper criteria, this Court found no basis to say that the determination was wrong, notwithstanding the occurence of an injurious condition. The *Morales* case concerned the intrusion into the vessel of a substance which was mixed with cargo then being loaded aboard and therefore somewhat more closely associated with the vessel and her appurtenances than the willow tree on the bank in the present case. It therefore clearly supports the District Judge in his determination that the vessel was not rendered unseaworthy by the intrusion of the willow branch which proved to be the noxious agent here.

Thus it appears that in this case the Court of Appeals has not rendered a decision in conflict with the decision of another Court of Appeals on the same matter or in conflict with applicable decisions of this Court but that, on the contrary, the decision of the Court of Appeals here is in accord with the decision of this Court in the only analogous prior case to be found.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated, San Francisco, California,
March 7, 1966.

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